

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JAMES R. POLETTE,

Plaintiff,

V.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

CASE NO. C12-6002 BHS

## ORDER ADOPTING REPORT AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt.18), and Plaintiff James R. Polette’s (“Polette”) objections to the R&R, (Dkt. 19).

## I. PROCEDURAL & FACTUAL BACKGROUND

On February 25, 2014, Judge Strombom issued an R&R recommending the Court affirm the Administrative Law Judge's (ALJ's) decision that Polette is not disabled and denying benefits. Dkt. 18. On March 14, 2014, Polette filed objections to the R&R. Dkt.

1 19.<sup>1</sup> On April 4, 2014, Defendants filed a reply, arguing in part that R&R should be  
 2 affirmed. Dkt. 24.

3 **II. DISCUSSION**

4 **A. Standard of Review**

5 The district judge must determine *de novo* any part of the magistrate judge's  
 6 disposition that has been properly objected to. The district judge may accept, reject, or  
 7 modify the recommended disposition; receive further evidence; or return the matter to the  
 8 magistrate judge with instructions. Fed. R. Civ. P 72(b)(3).

9 **B. Objections**

10 Polette filed objections to the R&R, essentially arguing that: (1) the ALJ erred in  
 11 applying an incorrect legal standard by treating the opinion of a Washington State  
 12 disability examiner as a medical opinion, and (2) that the August 25, 2010 opinion of  
 13 treating physician Dr. Jeffry Ford, D.O ("Dr. Ford"), which was submitted to the Appeals  
 14 Counsel after the ALJ rendered his decision, demonstrates that the record lacks  
 15 substantial evidence to support the finding of non-disability. *Id.*

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17 <sup>1</sup> On March 17, 2014, the Commissioner filed a response objection to Polette's objection  
 18 because they were filed three days after the fourteen day deadline (Fed. R. Civ. P. 72(b)),  
 19 asserting that the Court has no duty to consider them as they are improper. Dkt. 21. On March  
 20 26, 2013, the Court issued an a show cause order directing Polette to show cause that he had just  
 21 reason for his delay in filing and permitted the Commissioner to file a reply. *Id.* at 2. On March  
 22 31, 2014, Polette filed a response to the show cause order, arguing that his objection were timely  
 pursuant to Fed. R. Civ. P. 6(d), which allows three days to be added to the actual service when  
 pleadings or other papers are delivered by means of other than direct personal service. Dkt. 22 at  
 2. In this case, the R&R was served by two means: electronically and by mail. Polette's  
 interpretation of Fed. R. Civ. P. (6) is correct. Further, due to the preference for hearing cases on  
 the merits rather than dismissing them on mere technicalities, the Court will so hear the  
 objections in this particular instance, where objections were only filed three days late and all the  
 briefing is in.

1      **1. Examiner's non-medical opinion affirmed by physician as medical opinion**

2      In evaluating the medical opinion evidence in the record in this case, the ALJ  
3      found in relevant part that non-medical state examiner James F. Smith's opinion, which  
4      was reviewed and affirmed by Dr. Robert G. Hoskin, M.D., a non-examining consultative  
5      physician, as his medical opinion (See AR 214-21, 355), reflected that:

6      ...in October 2009 and February 2010 ... [the] claimant could occasionally  
7      lift 20 pounds and frequently lift 10 pounds and stand and/or walk for about  
8      6 hours in an 8 hour workday and sit for about 6 hours in an 8 hour  
9      workday; but must periodically alternate sitting and standing to relieve pain  
10     or discomfort; and could occasionally climb, balance, stoop, kneel, crouch,  
11     crawl; and should avoid concentrated exposure to extreme cold or wetness  
12     (2F, 6F). The state agency opinion is given significant weight because it is  
13     consistent with the record as a whole.

14     AR 25. In addition, the ALJ found:

15     In November 2010 [the] claimant's treating doctor, Dr. [Michael  
16     Dansie], reported "I . . . discussed that based on what [he] has told me (his  
17     ability to both his long drive himself, (sic) and do activities of daily living)  
18     that he would not qualify for disability" (5F/10). In November 2010 Dr.  
19     Rodney Muhammad opined "apparently, this patient is fit enough to  
20     become physically aggressive and threatening. He had no problem with  
21     upper or lower extremity function when he felt his anger and aggression  
22     was justified." He further opined "he is also, apparently, capable of  
   functioning at a level that would allow for him to work in some capacity by  
   history alone" (5F/12). While somewhat vague, the opinions of [the]  
   claimant's treating and examining doctors that he is not disabled and can  
   likely work are given some weight because these opinions are generally  
   consistent with the record as a whole. The above residual functional  
   capacity for a limited range of light work, allowing for a sit/stand option  
   and limiting [the] claimant to unskilled work, gives [the] claimant the  
   benefit of the doubt as to his subjective reporting of pain, and better reflects  
   the record as a whole including [the] claimant's activities of daily living.

23     AR 26. In the R&R, Judge Strombom noted that although Polette had argued it was  
24     legally improper for a non-medical source to provide the initial residual functional  
25     capacity, the ALJ had properly given significant weight to the state agency's opinion  
26     and the treating physician's opinion.

1 assessment, and then months later for a medical source to affirm it, Judge Strombom  
2 found that argument without merit in her prior order denying Polette's motion/declaration  
3 for stay of proceedings and other relief. Dkt. 18 at 6 (*citing* Dkts. 12 and 14). Finding that  
4 Polette made essentially the same argument regarding the same issues in his opening and  
5 reply briefs and presented no new, valid reasons for overturning the prior ruling on those  
6 issues, Judge Strombom determined Polette's argument to be without merit on the same  
7 basis as her prior ruling. *Id.* at 6, n.2 (*citing* Dkts. 12 and 14).

8       Similarly, in Polette's objection to the R&R, she argues that it was legally  
9 improper for a non-medical source to provide the assessment and then for a medical  
10 source to affirm it, as an “affirmation” is not a bona fide medical opinion” pursuant to  
11 Social Security regulations. *See* Dkt. 4-5. However, Polette's points to no regulation or  
12 other legal basis that actually prohibits an ALJ from considering as a medical opinion the  
13 report of an M.D., who reviewed and affirmed the specific findings and conclusion of a  
14 state examiner, and adopted it as his or her own medical view. Additionally, contrary to  
15 Polette's contention is was not error for Judge Strombom to refer to her prior order on the  
16 same issue (Dkt. 14) to help her arrive at her conclusion that Polette's argument  
17 concerning essentially the same issue was without merit. *Id.* at 6. Polette's objections to  
18 Judge Strombom's well-reasoned R&R concerning this issue are without merit. Thus, the  
19 Court adopts the R&R on this basis.

20       **2. Dr. Ford's report and substantial evidence**

21       Polette submitted a report from Dr. Ford's dated August 25, 2010 to the Appeals  
22 Council, not the ALJ. That opinion in relevant part:

1 Mr. Polette has been a patient of mine the past 12 years. The past 6 years he  
2 has been struggling with progressive back pain with lumbar radiculopathy.  
3 He has some foraminal stenosis and degenerative disk disease as noted on  
4 his lumbar MRI done August 2009. He is very limited despite significant  
5 pain medication in his activity level due to aggravation of his symptoms  
6 with any prolonged standing or sitting. Due to this he has been unable to  
7 work for some time. He needs to be able to change positions frequently and  
8 generally lay supine for much of the day. . . .

9 AR 189.

10 Judge Strombom found that:

11 First, Dr. Ford's own treatment notes fail to support his subsequent  
12 disability opinion, as they contain little in the way of objective clinical findings or  
13 observed functional limitations that are consistent therewith. *See AR 195, 199,*  
14 *204, 242; Batson*, 359 F.3d at 1195. Second, those notes show as well plaintiff  
15 engaged in significant work-related activity that also is at odds with Dr. Ford's  
16 disability opinion. *See AR 194-95, 204-06; Morgan*, 169 F.3d at 601-02  
17 (upholding rejection of physician's conclusion that claimant suffered from marked  
18 limitations in part on basis that claimant's reported activities of daily living  
19 contradicted that conclusion). Third, Dr. Ford's disability opinion is directly at  
20 odds with the substantial weight of the medical evidence in the record, including  
21 the opinion of the other treating and examining physicians in the record  
22 discussed by the ALJ. *See AR 24-26; Batson*, 359 F.3d at 1195.

23  
24 Polette argues that Judge Strombom gave "short shrift" to the opinion of treating  
25 physician, Dr. Ford, arguing that, a proper evaluation of his opinion would result in  
26 findings that Polette was disabled. Dkt. 19 at 7. Specifically, Polette argues that Judge  
27 Strombom erred in concluding that his opinion was not supported by objective findings  
28 or observed functional limitations, mainly because of his reference to an August 2009  
29 spinal MRI, which showed specific issues at various points in the spine. *Id.* at 8. Polette  
30 argues that other evidence in the record also supports Dr. Ford's opinion that he is  
31 disabled, including the opinion of Dr. Muhammad, D.O. (AR 341) and state examiner  
32

1 Smith, who agreed that the MRI showed “very severe spinal stenosis” (AR 221). *Id.* at 8-  
2 9.

3 The Court finds that while Dr. Ford referenced the August 2009 MRI, showing  
4 medical issues with Polette’s spine, his additional medical opinion does not provide a  
5 sufficient basis for reversing the ALJ’s decision. Dr. Ford’s brief note lacks the  
6 specificity and explanation necessary to find Judge Strombom erred in rejecting his  
7 opinion. Without more in the way of objective clinical findings or observed functional  
8 limitations from Dr. Ford explaining why it is necessary for Polette to lay supine for  
9 much of the day, indicating clearly what “much of the day” means in terms of hours and  
10 whether that alleged need is for a consecutive or intermittent number of hours during a  
11 work day, the Court has no basis to find Judge Strombom’s conclusion was incorrect.

12 Additionally, Polette argues that Judge Strombom inappropriately discounts Dr.  
13 Ford’s opinion because the “work-related activity” referenced by the ALJ in a September  
14 2009 note from Dr. Ford actually occurred prior to Polette’s alleged disability onset. *See*  
15 Dkt. 19 at 9-10. Even if this is so, as it appears to be, the ALJ discussed other medical  
16 opinions which establish that Polette engaged in activities of daily living which support  
17 the conclusion that substantial evidence in the record exists to uphold the ALJ’s decision  
18 that the Polette is not disabled. For example, Dr. Dansie noted Polette was capable of  
19 long drives. AR 24-25, 337. Dr. Muhammad wrote Polette’s was able to drive with “little  
20 or no problem.” AR 25 and 338. Dr. Muhammad also noted Polette admitted to “raking  
21 leaves in his yard and doing other chores for several hours before pain ensues.” *Id.*  
22 Further, Polette reported playing golf and mowing the lawn for 4 hours. AR 22, 200 and

1 233. Polette also reported assisting with a remodel and packing for moving, wherein he  
2 spent many hours per day over the course of multiple days “packing and unpacking” and  
3 “taking down cabinets.” AR 21, 224. Substantial evidence in the record exists to support  
4 the ALJ’s conclusion.

5 **III. ORDER**

6 The Court having considered the R&R, Plaintiff’s objections, and the remaining  
7 record, does hereby find and order as follows:

8 (1) The R&R is **ADOPTED**; and  
9 (2) This action is **DISMISSED**.

10 Dated this 8<sup>th</sup> day of May, 2014.

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14 BENJAMIN H. SETTLE  
United States District Judge  
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